No. 18265

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LARRY'S SANDWICHES, INC., a California corporation,

Appellant,

vs.

PACIFIC ELECTRIC RAILWAY CO., a California corporation,

Appellee.

Appeal From the United States District Court for the Southern District of California Central Division.

BRIEF FOR APPELLEE.

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Statement of the Case.

This is an action founded on negligence. There was considerable conflict in certain aspects of the evidence, and hence Appellee cannot agree with the contention there was "very little conflict in the evidence of the parties. . . ." (Appellant's Br. p. 5). It is true that Appellee's evidence of due care in the handling of the car in transit by all the participating railroads was virtually uncontroverted. It is also true that evidence of the parties was without conflict that at least part of the shipment of sandwiches was in an unfrozen

condition when the car arrived at Chicago. Beyond that, there was considerable evidence that raised a reasonable doubt as to whether or not all the sandwiches were actually frozen when tendered to the Appellee at Culver City. Thus, the evidence was conflicting as to the reason for the "bad order" of the shipment at destination.

Appellee offered evidence that the participating carriers were free from negligence, that the car was transported with reasonable dispatch, and that the carriers strictly complied with the instructions given by Appellant, as shipper, and with the rules of the published tariff. It based its defense primarily upon those propositions. Secondly, it endeavored to show there was a reasonable possibility that at least part of the shipment (that which was found to be unfrozen at Chicago) was never in a frozen condition when loaded at Culver City. The sandwiches were not subject to visual inspection at the time of loading, because they were individually wrapped in foil, sealed, and placed in a cardboard box which, in turn, was placed in a corrugated paper case and sealed with tape. The lading was not observed by anyone enroute, for the car was loaded by the shipper, the doors sealed at origin and not unsealed until it reached destination. As a consequence, Appellee relied upon the bill of lading recitation that the shipment was received by it from the shipper only "in apparent good order, except as noted (contents and condition of contents of packages unknown)."

It is true the District Court made no finding of fact as to whether or not the shipment was frozen and otherwise in good condition at the time of delivery to the Appellee. The reason therefor is that under the evidence the Court could make no such finding, but could only find the condition to be as agreed to by the parties and stated in the bill of lading, which finding was in fact made [R. A. p. 43, lines 12-15].

Appellant did not quite accurately state the legal premise upon which judgment was rendered for Appellee. One important element of the premise was omitted. Appellant failed to state (Appellant's Br. p. 7) that the Court on overwhelming and uncontroverted evidence found that Appellee was free from negligence, had carried out the shipping instructions, and had complied with all tariff rules, and that after such showing the Appellant *then* failed in his cause because he could not show some specific negligent conduct, which he had a duty by law to prove. He failed, not because such burden was not met in his direct case or case in chief, but because in rebuttal he failed to sustain his burden of overcoming Appellee's proof. This is the crux of the matter. Thus, again this Court is presented with a freight loss and damage case involving ". . . a step-by-step progression through an accepted scheme of shifting burdens of proof. . . ." (*Daido Line v. Thos. P. Gonzalez,* 9th Cir., 1962, 299 F. 2d 669, 671).

ARGUMENT.

Appellant in Point 5 of its brief, pages 30 to 41, has challenged findings VII, VIII and IX as being against the weight of the evidence. The following is submitted pursuant to the requirement of Rule 18(3) of this Court, specifying that Appellee's Brief contain record references to the evidence supporting the challenged findings.

I.

The Evidence Overwhelmingly Supports the Finding of Compliance With Provisions of the Bill of Lading and of Applicable Protective Tariff Rules and Regulations (Finding VII).

(a) Section 2(a) of the Contract Terms and Conditions of the bill of lading [Ex. 4] provides that:

> "No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch."

The shipment departed Culver City on July 21, 1960, and arrived in Chicago and was delivered to the consignee on July 27, 1960, a lapse of six days, which was a reasonable time for the transportation thereof [Tr. p. 259]. Appellant offered no evidence that the shipment was not transported with reasonable dispatch.

(b) Rules 130 and 135 of the Perishable Protective Tariff No. 18 [Ex. J], applicable to this shipment, provide as follows:

"Rule 130

CONDITION OF PERISHABLE GOODS NOT GUARANTEED BY CARRIERS

Carriers furnishing protective service as provided herein do not undertake to overcome the inherent tendency of perishable goods to deteriorate or decay, but merely to retard such deterioration or decay insofar as may be accomplished by reasonable protective service, of the kind and extent requested by the shipper, performed without negligence."

"Rule 135

LIABILITY OF CARRIERS

Property accepted for shipment under the terms and conditions of this tariff will be received and transported subject to such directions, only, and to such election by the shipper respecting the character and incidents of the protective service as are provided for herein. The duty of the carriers is to furnish without negligence reasonable protective service of the kind and extent so directed or elected by the shipper and carriers are not liable for any loss or damage that may occur because of the acts of the shipper or because the directions of the shipper were incomplete, inadequate or ill-conceived."

(c) The evidence supporting Finding VII generally and the exercise of ordinary care and the furnishing of reasonable refrigerated protective service [Find. VIII] by Appellee and its connecting carriers, is as follows:

Although Appellant failed to comply with Rule 705 of the Perishable Protective Tariff [R. A. p. 34] by placing on the bill of lading [Ex. 4] the requisite notation that mechanical protective service for frozen commodities was desired by the shipper, it was conceded at the trial by Appellee that the shipment was handled in transit as a frozen shipment, although the contents and the condition thereof when tendered at point of origin, insofar as Appellee was concerned, was only that as described in the bill of lading.

Appellant concedes that at the time the car was being loaded at Culver City, on July 20 and 21, 1960, the air temperature inside thereof was cold (below 10°) and it was in good working order [Tr. pp. 74 and 129]. The car in which the shipment was transported was a new mechanical refrigerator railroad car, having been initially placed in service in May, 1960 [Tr. pp. 377-378]. It was of the type ordered by Appellant [Tr. p. 263]. It was of the latest design and construction [Tr. pp. 379-392]. The trip involved was the third trip the car had made since initially placed in service [Tr. p. 377; Ex. "A"]. The shipment was loaded by Appellant and the doors of the car were sealed by the shipper at origin [Tr. pp. 258-259]. The seals were intact at destination [Supplementary Stipulation of Facts, R. A. p. 32], indicating that the doors were not opened in transit, that the load was not disturbed by outsiders enroute, and that the carriers had no means of ascertaining the condition of the shipment before it was delivered to the consignee.

The inspection report [Ex. "A"] which accompanied the car from origin to destination shows these perti-

nent facts, written thereon by the various employees of the carriers who had occasion to observe the car and the mechanical functioning thereof:

The mechanical refrigeration system was started at 8:00 A.M. on July 19, 1960, at which time the thermostat was set for −5°; that the car was inspected enroute at Colton, California, Tucumcari, New Mexico, Kansas City, Kansas, Silvis, Illinois, and Burr Oak, Illinois, and in each instance the diesel engine that runs the refrigeration system was found to be properly operating and that the highest degree of temperature observed in transit by any such inspecting employee was +7°.

The station service reports of inspection attached to affidavits of the inspectors were received in evidence as Exhibits "C", "D", "E", "F", "G", "H" and "I". They, together with Exhibit "A", show in detail the observations made of the car from the time it was ordered by the Appellant at Los Angeles, until it was delivered to the consignee at destination. In each instance, the record shows satisfactory thermometer readings to safeguard a frozen shipment, the proper functioning of the diesel engine, and an adequate fuel supply.

The only record of handling of the car which required explanation was the broken street ell episode at Chicago, occurring on the evening of July 26, 1960. The fact that the carrier involved exercised ordinary care in making repairs within approximately two hours after the defect was observed was shown by the testimony of the refrigeration repairman [Tr. pp. 274-303]. By his testimony, it was shown that while the engine was

not operating the temperature inside the car did not rise above 12°, and that this temperature was immediately reduced to 6° as soon as the temporary repairs were made, the engine was started, and the air was again circulating. The conclusion is that the air temperature measured by the thermometer in the air chamber adjacent to the compressor, while the air was not circulating, was higher than the air in the chamber surrounding the lading [Tr. pp. 412-414]. In fact, the air surrounding the lading did not rise above 6° inasmuch as this temperature reading was observed on the thermometer by the repairman within 30 or 40 minutes after the engine was restarted and the air circulation resumed [Tr. p. 287].

Upon return to Los Angeles, the car's thermostat and thermometer were on August 16, 1960, tested for accuracy by use of a potentiometer and a thermocoupler. Both were found to be functioning in a proper manner [Tr. p. 485, line 23, to p. 486, line 1], the thermometer itself being off only ½ of a degree.

(d) There was no evidence that any act or omission on the part of Appellee or its connecting carriers was the proximate cause of the loss [Find. IX], but there was considerable convincing evidence all the sandwiches were not frozen when tendered to Appellee at origin, thus furnishing proximate cause. Appellant testified that the sandwiches after manufacture were placed in the freezer, where they remained for a minimum of 24 hours before being taken out and shipped [Tr. p. 25]. The first-in and first-out method was used [Tr. p. 25]. At the time a box of sandwiches came off the assembly line, it was marked in chalk

with the day of the month before it was placed in the freezer [Tr. pp. 22 and 107]. After taking the sandwiches out of the freezing room, the pulp temperatures were taken before they left the plant, but no record of such temperatures was made [Tr. p. 109]. In fact, there was a singular lack of record keeping by Appellant in any phase of the freezing process. For example, the thermometer temperatures in the freezer were read three or four times per day, but no log of the readings was kept [Tr. p. 105]. It was Appellant's opinion that to be frozen a sandwich must be reduced to a temperature below 28°, and under normal operations at load time the range would be from zero to even –10° or up to 20° [Tr. p. 70]. It was his opinion that the lading would rise only 5° during a slow loading process [Tr. p. 71], but might be as high as 20° or 25° at the time of loading [Tr. p. 110]. It took approximately two days to load the rail car involved [Tr. pp. 37-38]. The merchandise was trucked for one mile from the plant to the rail car [Tr. p. 70]. The trucks used in the transportation of the lading from the plant to the car were not refrigerated [Tr. p. 28]. During the loading process, the car door was open during the length of time it would take to unload the truck, which Appellant estimated to be between one and one and one-half hours [Tr. p. 72]. No effort was made to shroud the opening between the rail car and the back end of the truck during loading [Tr. p. 112]. Thus, the total elapsed time the commodity was out of the freezer until it was loaded was approximately two hours [Tr. p. 72]. A truck would hold approximately 400 cases and three or four

truckloads per day were loaded [Tr. p. 73]. After loading was completed, Appellant sealed the rail car doors [Tr. p. 40]. A total of 2316 cases were loaded [Ex. 4].

On direct, Appellant's witness stated there were three doors in the freezing room [Tr. p. 101], but on cross-examination, he conceded two of the three doors were only 18 or 20 inches square and that doors of such size could not accommodate a palletized load [Tr. p. 132]. The boxes of sandwiches were stacked on pallets when placed in the freezer [Tr. pp. 17-18]. Since no in and out records were kept, considerable doubt existed as to whether the first in were actually the first out, as Appellant testified. The freezing room was 40′ by 18′ and would hold approximately 100 pallets, of the 28″ by 32″ size used by Appellant. With 100 palletized loads in the freezer at a time, containing 3500 cases of sandwiches, there would be no aisle room left for maneuvering pallets [Tr. pp. 100-101]. Although every case was marked, according to the Appellant's testimony [Tr. pp. 22 and 107], the Western Weighing and Inspection Bureau Inspector at Chicago stated he saw no chalk marks, code marks or lot numbers on any of the cases [Tr. p. 333]. The Bureau Inspector at Chicago spent one hour inspecting the load [Tr. p. 332] on July 28, 1960, the day after the car arrived [Tr. p. 327]. He opened 20 cases during this inspection [Tr. p. 336], but had a very difficult time finding a case that was warm and sandwiches moldy [Tr. p. 336]. After considerable searching, he finally found one that was warm to the touch, located 3 rows from the wall and in the fourth layer from the top of

the load [Tr. p. 336]. It was directly adjacent to boxes that were cool to the touch and which contained frozen sandwiches. The warm sandwiches had a temperature of 64°, causing the witness to conclude that it was not frozen when originally put in the car [Tr. p. 337]. Boxes of warm sandwiches were found interspersed in the load, with frozen sandwiches adjacent thereto [Tr. p. 340]. Pulp temperatures ranging from 16° to 64° were found. In boxes that were frozen, he observed pulp temperatures ranging from 16° to 22°. In boxes not frozen, he observed a range of temperatures from 44° to 64° [Tr. p. 340]. No warm or moldy sandwiches were found in the periphery of the load. He was particularly looking for such sandwiches in the periphery, because where there is in-transit defrosting, such sandwiches are found around the top of the load and in the sides of the load first [Tr. p. 341]. Sandwiches located next to the sides of the car had a range in temperature from 16° to 22° [Tr. p. 357]. He found one warm box of 44° and frozen boxes on either side [Tr. p. 359]. He found another box with a temperature of 64°, and all the boxes around it were in a freezing condition [Tr. p. 360]. He took pulp temperatures in that portion of the load which had not previously been disturbed by others who had entered the car before he did [Tr. pp. 331-332]. He took approximately 35 pulp temperatures [Tr. p. 367] and only a few of the sandwiches he observed (5 to 10%) were moldy [Tr. p. 368].

The Chief Engineer for the Pacific Fruit Express Company [Tr. p. 373], which company owned the refrigerator car, testified concerning the design and con-

struction thereof. He was personally responsible for the design of the refrigerating, air conditioning and air circulating system within this car [Tr. p. 377]. It was equipped with a diesel engine, compressor and cooling coils, through which cold air was blown by a blower, causing the air to circulate in the flue in the sides, end wall, ceiling chamber and space under the floor racks [Tr. p. 387]. There were air openings in the ceiling, permitting air to travel through the lading compartment [Tr. p. 387]. The sensing elements of the thermostat [Tr. p. 391] and for the thermometer [Tr. p. 392] are located in the return air stream, which is warmest air in the car. Thus, a weighted average of all temperatures in the car, including the lading, is measured [Tr. pp. 393-394]. The thermometer measuring the inside car temperature is located on the side of the car, thus making it unnecessary to open either the doors to the lading compartment or to the engine compartment to obtain inside temperature readings [Tr. p. 391]. The car functions as a cold storage facility [Tr. p. 397], designed to hold commodities at frozen temperatures, but not designed to freeze unfrozen commodities in transit [Tr. p. 400]. Appellee's refrigeration expert testified that Appellant's freezing practices were not entirely sound [Tr. pp. 404-407]. Best practice would be to freeze individual packages before they are bunched together, which Appellant did not do. Too much exposure to air temperatures between plant and rail car resulted in trucking one mile in unrefrigerated trucks and by not using a shroud. The high temperature in Culver City on July 21, 1960, was 92° [Ex. 10].

Appellee's expert conducted a test with "Poor Boy" sandwiches, similar to those involved in this suit. He reduced the product to zero degrees, inserted one thermometer into the bread and one into the meat while the sandwiches were still inside the carton, still wrapped in foil. He removed them to room temperature at about 70° and discovered that at the end of 30 minutes the meat temperature had risen 10° and the bread 20°. After the end of one hour, the meat had risen 10° and the bread 26°. At the end of four hours, the meat had risen to 44° and the bread to 56°. At the end of one and one-half hours, the approximate time the involved shipment was out of the freezer before loading into the rail car, Appellee's expert found that the meat had risen to 14° and the bread to 32° [Tr. pp. 407-409].

If the refrigeration system of the car had failed, the periphery of the load would be the first to warm up [Tr. pp. 411-412]. The Bureau Inspector at Chicago found no warm sandwiches in the periphery [Tr. p. 341].

Appellee's refrigeration expert analyzed the seven inspection reports [Ex. "C" to "I", incl] containing the temperature readings taken in transit, the fuel consumption, the operation of the equipment, and he concluded from said records that the equipment was operating satisfactorily for the entire trip [Tr. pp. 414-415].

There was more than adequate evidence to support Findings VII, VIII and IX.

II.

The Province of This Court Requires Upholding the Findings of the District Court.

(a) Appellant Wants This Court to Reweigh the Evidence.

Appellant makes no complaint of any error in the admission or exclusion of any evidence tendered by either side, and he complains of no irregularity at the trial. Appellant simply feels the District Court reached the wrong decision, and would have this Court review all the evidence, weigh it and judge of its credibility, and then review Findings VII, VIII and IX, because they "are so clearly against the weight of all of the evidence. . . ." (Appellant's Br p. 10). Although in the specification of errors Appellant states that in general the findings are erroneous as against law, in his argument that follows it is clear that his complaint is that not only the aforementioned findings, but also the findings in general are against the evidence.

(b) Federal Appellate Courts Are Required to Accept Findings if Not Clearly Erroneous and if Supported by Substantial Evidence.

Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A. provides that in an action tried to the Court the findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

It is well established that Appellate Courts are required to accept findings of fact if supported by substantial evidence and not clearly erroneous.

Federal Security Insurance Co. v. Smith (10th Cir., 1958), 259 F. 2d 294;

Wunderlich v. United States (10th Cir., 1957), 240 F. 2d 201; cert. den. 353 U. S. 950, 77 S. Ct. 861, 1 L. Ed. 2d 859.

Substantial evidence means more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126.

On appeal the evidence is to be viewed in the light most favorable to the prevailing party.

Lindsey v. Oregon-Washington Plywood Co. (10th Cir., 1961), 287 F. 2d 710.

Appellate Courts may not substitute their judgment if conflicting inferences may be drawn from the established facts by reasonable men, and the inferences drawn by the trial court are those which could have been drawn by reasonable men.

Timken Roller Bearing Co. v. United States, 341 U. S. 593, 596-597, 71 S. Ct. 971, 95 L. Ed. 1199.

This is particularly true where fact issues are not decided on written evidence alone, but the credibility of witnesses is involved, as is the case here. Rule 52(a) has recently been held to apply even when the trial court has not had the opportunity to judge the credibility of witnesses.

Lundgren v. Freeman (9th Cir., 1962), 307 F. 2d 104.

III.

No Error Was Committed by the District Court in Finding That Appellant Failed in Sustaining Burden of Proof That Appellee Was in Any Way Negligent (Finding X).

After Appellant offered evidence that the sandwiches were tendered to Appellee in a froxen condition, the burden of going forward shifted to Appellee, who showed that it complied with all requirements of the bill of lading and tariffs, transported with reasonable dispatch, exercised due care, and was completely free from negligence. It was Appellee's theory at the trial, which theory was adopted by the District Court in Finding X, that the burden of going forward with the evidence to show some specific negligent conduct on the part of the carriers then shifted back to Appellant. It is obvious that Appellant also recognized this burden, for in rebuttal Appellant called a consulting engineer, who was an expert in the field of refrigeration and air conditioning [Tr. pp. 509-511]. He testified with respect to certain hypothetical conditions that might have caused a failure in the refrigeration equipment in transit. He stated there might have been the possibility of failure of the air flow, or the possibility that the fan had a tight bearing. "This kind of thing can happen. I don't want to put any probability on it." Also, he thought there was a possibility of the failure of the interlock mechanism [Tr. p. 527]. Further, "I think we can say a possibility exists that any one of these failures which we have mentioned might have corrected themselves . . ." [Tr. p. 528].

This type of evidence was pure conjecture and surmise and was not sufficient to overcome Appellee's proof. The District Court so found in Finding X.

IV.

The District Court Did Not Predicate the Judgment on an Erroneous Interpretation of the Law.

(a) Burden of Proof on Shipper Throughout.

Under Point 1 of Appellant's Brief, pages 11 to 17, it is argued that Appellant had no duty to establish some specific act of negligence on the part of the carriers as a condition precedent to recovery, particularly since Appellee did not explain the true cause of the damage.

Under Point 2 of Appellant's Brief, pages 17 to 20, it is urged that the case was decided below upon an erroneous interpretation of the law as to burden of proof. The questions as to duty to establish negligence and as to burden of proof are so mixed and interdependent, they will be considered and answered together under Appellee's Point IV.

In the first place, it is not conceded that the true cause was not proved, for under the facts it could very well be concluded that the loss was proximately caused by the shipper in not tendering to the carrier a properly frozen shipment. A bill of lading Section 1(b) exception (act or default of the shipper) would therefore be available.

In the second place, the Carmack Amendment to the Interstate Commerce Act, 48 U. S. C. A. 20(11), as interpreted by Federal cases, does not require the carrier to prove the specific cause. All that is necessary to a successful defense of perishable commodity cases, governed by Tariff rules 130 and 135, is a showing by the carrier that it complied with instructions of shipper, the provisions of the bill of lading and tariffs,

and that it met its duty of furnishing, without negligence, reasonable protective service.

It is clear that in this type of case the burden of proof is on the shipper throughout. In *Chesapeake and Ohio R. Co. v. A. F. Thompson Mfg. Co.,* 270 U. S. 416, 422-423, 46 S. Ct. 318, 70 L. Ed. 659, it was held that in a suit under the Carmack Amendment, the burden of proof is on the plaintiff. When he introduces evidence of delivery of a shipment to a carrier in good condition, he makes out a *prima facie* case of negligence. However, when a railroad introduces evidence of the condition of the car from the time of shipment to the time of arrival at destination, it persuasively tends to preclude the possibility of negligence. If the proof ends there, the issue must as a matter of law be decided in favor of the carrier. As stated by the Court:

> "The respondent (shipper) therefore had the burden of proving the carrier's negligence as one of the facts essential to recovery. When he introduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the petitioner (railroad) became subject to the rule applicable to all bailees, that such evidence makes out a prima facie case of negligence. (Citing cases). The effect of the respondent's (shipper's) evidence was, we think, to make a prima facie case for the jury. (Citing cases). But even if this 'prima facie case' be regarded as sufficient, in the absence of rebutting evidence, to entitle the plaintiff to a verdict (citing cases), the trial court

> erred here in deciding the issue of negligence in favor of the plaintiff as a matter of law. For the petitioner (railroad) introduced evidence of the condition of the cars from the time of shipment to the time of arrival, which persuasively tended to exclude the possibility of negligence."

The burden of proof never shifts and if the carrier presents evidence sufficient to raise doubts as to the validity of the inference of negligence raised by the shipper's evidence, which the trier of fact is unable to resolve, the shipper does not sustain his burden unless he proves some specific negligent conduct on the part of the carrier that proximately caused the loss.

> *Commercial Molasses Corp. v. N. Y. Tank Barge Corp.*, 314 U. S. 104, 62 S. Ct. 156, 86 L. Ed. 89.

(b) A Successful Defense Is Established by Proof of Compliance and Exercise of Ordinary Care, Unless Shipper Shows, in Rebuttal, Specific Acts of Negligence.

The general principles of these two Supreme Court cases have been applied many times by various Courts of Appeal and District Courts. That this is the rule in this Circuit, is demonstrated in *Hamilton Foods, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 83 F. Supp. 478, affirmed (9 Cir., 1949) 173 F. 2d 573:

> "When proof is given by the plaintiff that property delivered to a common carrier in good condition was damaged while in the hands of the common carrier, a presumption arises that the damage was due to negligence and the burden of proof is upon it to show that it was free from negligence

or that notwithstanding its negligence the damage occurred without its fault—that is, the negligence did not contribute to the damage.

"The rule of perishable protective tariff approved by the Interstate Commerce Commission, is that if the goods arrive at the place of delivery in bad condition which was caused by lack of ordinary care on the part of the carrier, it is liable; *but a compliance with it is a defense against a charge of negligence. In other words, the measure of the duty of the carrier was to use reasonable, ordinary diligence. Under the protective tariff application shippers of perishable property must show that there was a lack of ordinary care on the part of the carrier.*" (Emphasis added.)

This is also the rule in the 5th Circuit, as stated in *Atlantic Coast Line R. Co. v. Georgia Packing Co.* (5 Cir., 1947), 164 F. 2d 1, 4:

"Under the protective tariffs applicable in this case the shipper must show that there was a lack of ordinary care on the part of the carrier, *but proof by the carrier of compliance with the shipper's instructions is a complete defense to an allegation of negligence in connection with the protective service.* Sutton v. Minneapolis & St. L. R. Co., 222 Minn. 233, 23 N.W. 2d 561; Southern Pacific Co. v. Itule, 51 Ariz. 25, 74 P. 2d 38, 115 A.L.R. 1274. *Plaintiff did not in any degree sustain its burden of proving the specific acts of negligence charged, while defendant-appellant incontrovertibly showed more than full compliance with plaintiff's instructions.*" (Emphasis added.)

Another case in the 5th Circuit following this rule is *Austin v. Seaboard Air Line R. Co.* (5 Cir., 1951), 188 F. 2d 239, 241:

> "Here, it was shown that the trees were loaded by plaintiff, and that an inspection was made by him before delivery of the shipment to the initial carrier. The box car furnished was in good condition, and was the type air-tight car ordered by plaintiff. Moreover, it is without dispute that after loading, the car was sealed, and that the shipment arrived at its destination with the seals unbroken. The evidence conclusively reveals that there was no unreasonable delay in the delivery of the shipment. Under such circumstances, the proof is more than adequate to overcome any inference of negligence on the part of the carrier, and the loss of the shipment must therefore be borne by the shipper. Chesapeake & O. R. Co. v. A. F. Thompson Mfg. Co., 270 U. S. 416, 423, 46 S. Ct. 318, 70 L. Ed. 659; see also, Atlantic Coast Line R. Co. v. Georgia Packing Co., 5 Cir. 165 F. 2d 169, 170."

This is also the rule of the 6th Circuit, as stated in *Delphi Frosted Foods Corp. v. Illinois Central R. Co.*, 89 F. Supp. 55, 60, affirmed (6 Cir., 1951), 188 F. 2d 343:

> "The evidence introduced by defendant is not only sufficient to raise an unresolvable doubt as to the validity of the inference of negligence arising from the prima facie case made by the plaintiff's proof but it is amply sufficient to persuade that non-existence of negligence in the performance

> of the duty to afford reasonable protective service of the kind and extent requested by the shipper is as probable as its existence. The plaintiff has not sustained the burden of persuasion which upon the whole evidence remains upon it, where it rested at the start."

Appellant places great reliance on *Thompson v. James G. McCarrick Co.* (5 Cir., 1953), 205 F. 2d 897, where it is stated (at p. 900) that after the shipper's *prima facie* case "the burden shifts to the carrier to show the cause of damage and that it is not liable therefor." This was a wholly gratuitous statement on the part of the Court for the only issue in the case was whether as a condition precedent to recovery a timely claim in writing had been filed. It is interesting to note that the Fifth Circuit Court of Appeals never referred to its prior decisions in the *Georgia Packing Co.* or the *Austin* cases, *supra,* where it was an issue as to whether proof by the carrier of compliance with instructions would constitute a defense, in the absence of rebuttal evidence by the shipper showing the specific cause.

The rule contended for by Appellee is also the rule in the 7th Circuit where in the case of *Hamilton Manufacturing Company v. Chicago and North Western Railway Company* (7 Cir., 1960), 277 F. 2d 652, after the carrier had shown it was free from negligence and had handled the shipment pursuant to shipper's instructions, the Court held:

> "The burden was on the plaintiff to establish that some negligence of the defendant carrier concurred in or contributed to the damage. No such proof was made and under the circumstances dis-

closed by the record the defendant was entitled to appropriate findings of fact, conclusions of law and judgment dismissing the complaint without costs."

This is also the rule in the 4th Circuit, as set forth in *South Carolina Asparagus Growers' Assn. v. Southern Ry. Co.* (4 Cir., 1931), 46 F. 2d 452, where Court held that in defending the suit the carrier showed by conclusive evidence that the car was transported with all due dispatch and was properly iced at all points where icing was necessary and, hence, was entitled to judgment.

This is also the rule in the District of Columbia Circuit. *Shapiro v. Pennsylvania R. Co.* (D. C. Cir., 1936), 83 F. 2d 581, was an action to recover damages against a railroad for failure to safely refrigerate a shipment of vegetables. The case was defended on basis that the car was iced at all regular icing stations and was in good mechanical condition. Judgment for the defendant was affirmed because (a) a carrier is not an insurer of perishable shipments, (b) the defendant had fully discharged every duty owing by it to the plaintiff, (c) the damage was therefore caused as a result of the inherent vice of the things shipped.

Lastly, this is the rule in the Southern District of New York, as set forth in *Standard Hotel Supply Co. v. Pennsylvania R. Co.,* 65 F. Supp. 439, where the Court held for the defendant carrier upon a showing that it had complied with the icing instructions as directed by the shipper. The Court held:

"The defendant railroad furnished reasonable protective service, of the kind and extent requested

> and directed by the plaintiff shipper under Tariff Rules 130 and 135; the loss was caused by the acts of the shipper, for which the railroad is not responsible. Shapiro v. Pennsylvania R. Co., 65 App. D.C. 324, 83 F. 2d 581; South Carolina Asparagus Growers Association v. Southern R., 4 Cir., 46 F. 2d 452; Leonard v. Pennsylvania R. Co., D. C., 15 F. Supp. 55, 56."

The decision in *Daido Line v. Thomas P. Gonzalez Corporation* (9 Cir., 1962), 299 F. 2d 669, upon which Appellant relies so heavily, is not contrary to the rule on burden of proof contended for by Appellee. This Court there recognized that (page 671):

> ". . . the attempt to establish liability by a step-by-step progression through the accepted scheme of shifting burdens of proof may present difficult problems."

But no such problems were presented in the case at bar. It is important to remember that in the *Daido Line* case, the shipper's bill of lading instructions to the carrier were to afford the shipment "ventilated stowage." It is not clear from the decision at what stage of the trial it was proved to the satisfaction of the Court that the carrier did not provide "ventilated stowage." It is submitted that at what stage or in what order of proof this evidence was adduced is wholly immaterial, for the Court found that the carrier did not provide "ventilated stowage" and that this act or omission constituted a failure to exercise reasonable care. The shifting burdens therefore presented no problem. It mat-

tered not whether the evidence on ventilation came in at the time the carrier was attempting to prove compliance with instructions and to prove the exercise of ordinary care, or whether it came in during plaintiff's rebuttal, for the specific act of negligence was proven not by conjecture or surmise, but by direct testimony of two of the ship's officers and from entries in the ship's log. With such a poor record of handling the shipment, it is difficult to ascertain why the case was defended at all. It is not out of line with the position Appellee takes here, but on the contrary supports Appellee's view that Appellant must prove a specific act of negligence in order to recover.

At page 675, the Court held:

> "On this evidence it was entirely reasonable for the District Court to conclude that the garlic was outturned in a damaged condition and that the events aboard ship provided an ample explanation for the condition in which the garlic was discharged, thus offering further support for the conclusion that the garlic was delivered to the vessel in good order and condition."

Conversely, in the case at bar, evidence as to the participating carriers' handling of the shipment from origin to destination offers ample support for the conclusion that the sandwiches were not delivered to the Appellee in good order and condition or that their loss was occasioned by inherent vice or defect, a condition to which all perishable shipments are subject.

The case of *Southern Pacific Co. v. Itule,* 51 Ariz. 25, 74 P. 2d 38, 115 A. L. R. 1268, succinctly answers Appellant's contention. That decision traces the development of the rule, showing its evolution from the rule applicable to loss and damage of inanimate or "dry" freight shipments, the rule pertaining to livestock, and finally a discussion as to the quantum of proof necessary in a perishable commodity case. The Arizona Court announces with clarity the rule adopted by it and by the Federal Courts:

> "We think the fairer and more logical rule is that in cases of the shipment of perishable fruits and vegetables, when the carrier shows affirmatively that it handled them in the method requested by the shipper, and that it exercised reasonable care to prevent any damage from any cause not necessarily involved in the method of transportation so chosen, that it has satisfied the requirements of the law in regard to the quantum of proof required to establish a defense to the action."

The record amply reflects the proper application of the law by the Court below, both as to duty and as to burden of proof. There is no requirement in the Act or in the case law that the carrier must establish the actual cause of the damage. The reason for this rule is that in cases of this kind, where perishable shipments are prepared, packaged and loaded solely by the shipper, the carrier does not know, nor does it have any means of ascertaining the condition of the shipment at the time it accepted it from the shipper. Be-

cause the shipper has sole control over these matters, only the shipper knows of the condition of his shipment. It is the shipper, therefore, not the carrier, who is in the best position to explain the cause of the loss. If he fails to meet this proof in rebuttal to the carrier's proof, he has left the trier of the facts, as he did here, with an "unresolvable doubt."

Commercial Molasses Corp. v. N. Y. Tank Barge Co., 314 U. S. 104, 111, 62 S. Ct. 156, 161, 86 L. Ed. 89;

Delphi Frosted Foods Corp. v. Illinois Central, 89 F. Supp. 55, 60, affirmed (6 Cir., 1951), 188 F. 2d 343.

Secretary of Agriculture v. United States (1956), 350 U. S. 162, 76 S. Ct. 244, 100 L. Ed. 173, is not applicable to the facts in the case at bar. That case involved the validity of tariff tolerance provisions respecting damage to shell eggs and was not an adversary proceeding between shipper and carrier. The sole issue was whether there was sufficient evidence before the Interstate Commerce Commission to support its order approving the filing of said tariffs. Some general propositions of law are discussed in the majority, concurring and dissenting opinions, but no consideration was given to the questions of duty to prove negligence or burden of proof under Tariff rules 130 and 135. There is nothing in that case that calls for a reversal here.

V.

The Findings Do Cover All Pertinent Issues and Hence Are Not Erroneous.

Under Point 3 of Appelant's Brief, pages 21 to 24, it is asserted that the findings are erroneous because all pertinent issues are not covered. Specifically, a complaint is lodged against (1) failure to find concerning the condition of the shipment at origin and (2) the cause of the damage.

As to condition of the shipment when tendered to the Appellee, it is submitted that the Court made the only finding possible to make under the state of the evidence. There was no clear showing by Appellant that all the sandwiches were in a frozen condition at Culver City. After what was observed at Chicago, it was fairly obvious that they were not—at least 5 to 10% were not. The Court could, therefore, make the only finding it could under the circumstances make, *i.e.,* that the parties agreed in the bill of lading that the sandwiches were in "apparent good order" [R. A. p. 43].

As to the cause of the damage, Appellee submits that under the authorities cited in Point IV herein, the law does not require the carrier to prove the cause of the damage in a *perishable shipment case* wherein Tariff Rules 130 and 135 are applicable. This is the preponderant Federal rule and is the rule of most state courts. See Annotation: Necessity of proving specific reason for injury or damage to shipment of fruit or vegetables in order to overcome *prima facie* case, etc., 115 A. L. R. 1274.

Formal findings of fact need not be made on evidence relating to redundant and immaterial issues.

> *Nuelsen v. Sorensen* (9 Cir., 1961), 293 F. 2d 454, 459.

VI.

No Error Was Committed in Finding That the Sandwiches Were Perishable.

Under Point 4 of Appellant's Brief, pages 25 to 30, inclusive, Appellant complains that the finding "Said sandwiches were in fact of a perishable nature" [R. A. p. 43, lines 15-16] is erroneous because it is contrary to uncontradicted evidence. This is not so because (a) at origin the parties agreed in the bill of lading [Ex. 4] that the condition of the contents of the 2316 cases of merchandise was unknown, (b) at destination, the sandwiches, or at least a portion thereof, were found to have in fact "perished", the inspectors for both parties agreeing that at least some were in an unfrozen and moldy condition, and (c) the finding makes no reference to "frozen" sandwiches but to "said sandwiches", some of which were unfrozen at destination and which, considering the whole evidence, were obviously in that state at origin.

Appellant had the difficult task of convincing the District Court that all the lading was tendered to Appellee in a frozen condition, when one case of sandwiches with pulp temperature of 64° was found in the core of the load at Chicago, completely surrounded by cases of sandwiches that were frozen solid. His task went from difficult to impossible when it was shown that at Chicago no unfrozen sandwiches were found in the periphery of the load. This is where one would expect to find unfrozen lading, if the refrigeration system had failed enroute, for the cold air circulates in air chambers, called flues, in the sides, end wall, top and in the floor of the car.

Appellant is arguing, in effect, that since a frozen commodity is inert, the law of freight loss and damages applicable to inanimate or dry freight should apply, *i.e.,* that if the carrier cannot prove a bill of lading Section 1(b) exception, it should not prevail. Appellant's argument is aimed at removing the case from the provisions of Rules 130 and 135.

Delphi Frosted Foods v. Illinois Central R. Co., 89 F. Supp. 55, aff. (6 Cir., 1951), 188 F. 2d 343, is a specific example of a case holding that frozen lading is perishable within the meaning of Tariff rules 130 and 135.

No contention was made in the trial of the case at bar the Rules 130 and 135 did not apply, and copies thereof were received in evidence without objection. Appellant had ample notice that Appellee would rely on the provisions of said rules, inasmuch as they were pleaded in its answer [R. A. pp. 9-10].

Conclusion.

The Appellee is not responsible as at common law for the loss of or damage to this shipment. It is responsible only for carrying out the Appellant's orders under Rules 130 and 135 of the Perishable Protective Tariff. These rules, being published in a tariff filed with and approved by the Interstate Commerce Commission, have the force and effect of law and constitute a statutory form of contract between the parties.

The evidence is virtually uncontradicted that Appellee carried out the instructions, which were to furnish mechanical refrigerated service to safeguard a shipment tendered as frozen. The shipment was enroute

six days and the temperature of the lading compartment of the car was recorded seven times, the highest observed being +7°. Appellant was satisfied that a sandwich was frozen if reduced to a temperature below 28°.

There was ample evidence to support all the District Court's findings and the judgment should, therefore, be affirmed.

Dated: March 8, 1963.

Respectfully submitted,

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Attorneys for Appellee.

Certificate.

I certify that, in connection with this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALT A. STEIGER
Attorney for Appellee.